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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 308

THE NEW JERSEY AND NEW YORK RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

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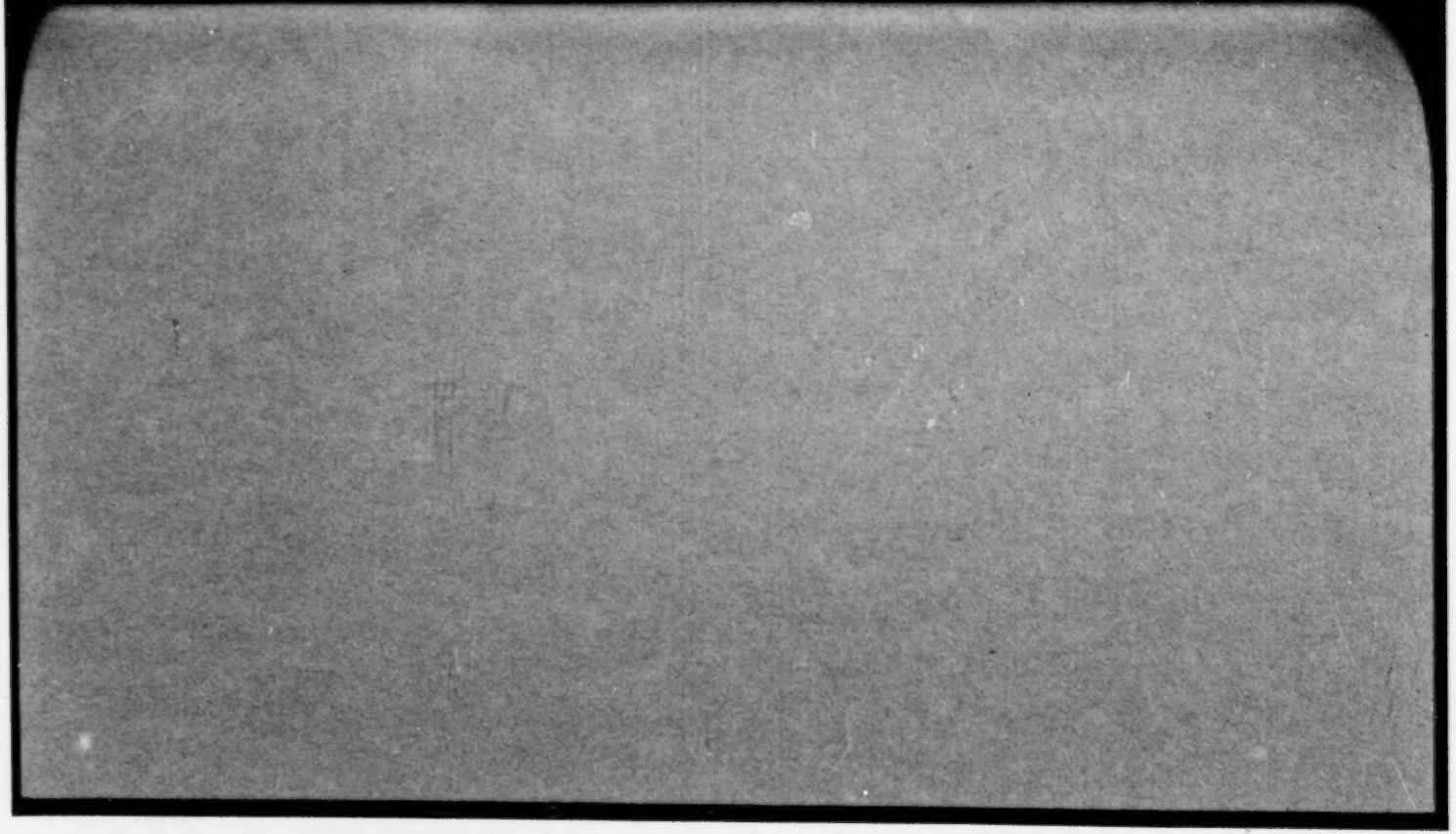

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STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant, The New Jersey and New York Railroad Company (Peter Duryee, Trustee) presents this, its statement particularly disclosing the basis upon which appellant contends that the Court has jurisdiction upon appeal to review the judgment appealed from herein.

Nature of the Case and Manner of Raising Federal Questions

This case involves the validity of a decision and order of the New Jersey Board of Public Utility Commissioners issued in the exercise of its delegated legislative authority. Said order requires appellant to continue the operation of

an unprofitable passenger train. Appellant contends that said order deprives it of its property without due process of law in violation of the provisions of the Fourteenth Amendment of the United States Constitution for two reasons: (1) it requires appellant to render a service at a loss when its entire operation is being conducted at a loss, which in and of itself, appellant contends, violates the provisions of the Fourteenth Amendment, and (2) in any event, the inconvenience to the public is so small in comparison to the benefits which both the railroad and the public will derive from such a discontinuance that the order amounts to unreasonable regulation in violation of the provisions of said Fourteenth Amendment.

These federal questions were raised by assignment of error (points on appeal) on appellant's appeal from the order of the New Jersey Board of Public Utility Commissioners to the Appellant Division of the Superior Court of New Jersey and on further appeal to the Supreme Court of New Jersey. The Appellate Division of the Superior Court of New Jersey (by a unanimous decision) rejected both of these contentions as being without merit. The Supreme Court of New Jersey also ruled adversely to appellant (by a 4 to 3 decision). It rejected the second of the appellant's contentions as being without merit and it deemed it unnecessary to pass on the first contention because, in its view, appellant failed to establish that its operations are being conducted at a loss. It reached this latter result by holding that appellant is a subsidiary of Erie Railroad Company and that unless such a subsidiary proves the reasonableness of any sums paid to its parent Erie on account of services rendered or equipment rented by the parent to such subsidiary, its operating deficiency cannot be considered bona fide. Thus, although the operating deficiency established by appellant would have been considered bona fide if appellant were not a subsidiary, the

Supreme Court of New Jersey held that because appellant is a subsidiary of the Erie, it is required to submit proofs of its operating deficiency beyond those ordinarily required of railroads which are not subsidiaries.

Whether or not appellant is a subsidiary of Erie raises a question of the interpretation of Section 77 of the Bankruptcy Act. As in the case of the two above mentioned constitutional questions, this federal question was also raised by assignment of error (point on appeal) on appellant's appeal to the Appellate Division of the Superior Court of New Jersey and on further appeal to the Supreme Court of New Jersey.[1] This question was thus raised because the basis of the decision of the New Jersey Board of Public Utility Commissioners was that "respondent is a subsidiary of Erie Railroad Company" and that "we adhere to the view that mere failure to earn a proper return on a line which is part of a system is not sufficient ground for discontinuance of a service." Both the Appellate Division of the Superior Court of New Jersey and the Supreme Court of New Jersey disregarded appellant's contention that while it is in reorganization under Section 77 of the Bankruptcy Act, appellant is not and cannot be a subsidiary of Erie Railroad Company.

Opinions Below

The opinion of the Supreme Court of New Jersey (together with the dissenting opinion of Brennan, J.) is reported in 12 N. J. 281, 96 A. 2d 526 (1953). A copy of said opinion is set forth in Appendix "A" hereto.

The opinion of the Appellate Division of the Superior Court of New Jersey is reported in 23 N. J. Super. 1, 92

[1] Appellant's brief filed with Appellate Division of the Superior Court of New Jersey (pp. 10-13); and appellant's brief filed with the Supreme Court of New Jersey (pp. 10-14).

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A. 2d 515 (1952). A copy of said opinion is set forth in Appendix "B" hereto.

Jurisdiction

The judgment of the Supreme Court of New Jersey which is sought to be reviewed herein, was entered on May 4, 1953. A petition for allowance of an appeal is presented to a Justice of this Court herewith, to wit, on July 28, 1953.

Jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, U. S. Code, Section 1257 (2), in view of the fact that there has been drawn in question the validity under the United States Constitution of the order of a state board issued in exercise of its delegated legislative authority and that the state courts have upheld its validity. The following decisions, holding that such an order is to be treated as state statute, sustains the jurisdiction of this Court to review the judgment on direct appeal in this case: *Live Oak Association* v. *Railroad Commission*, 269 U. S. 354, 356 (1926); *Lake Erie & Western R. Co.* v. *Public Utilities Commission*, 249 U. S. 422, 424 (1919); *Sultan R. & T. Co.* v. *Dept. of Labor*, 277 U. S. 135, 138 (1928); *Hamilton* v. *Regents*, 293 U. S. 245, 258 (1934); see *Williams* v. *Bruffy*, 6 Otto (96 U. S.) 176, 183 (1877).

The question of whether appellant is a subsidiary of Erie requires an interpretation of Section 77 of the Bankruptcy Act. This is a federal question not capable in itself of being raised by direct appeal. Therefore, the jurisdiction of this Court is also invoked under Title 28, U. S. Code, Section 1257 (3). The following cases sustain the invocation of this Court's jurisdiction to review this question in this manner in connection with the above-mentioned direct appeal: *Flournoy* v. *Wiener*, 321 U. S. 253, 263 (1944); *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547 (1922).

Questions Presented

The questions presented herein are contained in appellant's assignment of errors filed herewith and include the following:

1. Is the order of a state board requiring appellant, a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act, to continue operating an unprofitable passenger train, despite an overall loss on its entire operations, repugnant to the provisions of the Fourteenth Amendment to the United States Constitution?

2. Is appellant a subsidiary of Erie despite the fact that appellant is a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act (and despite the further facts that appellant's petition to be reorganized "as part of" the Erie has been rejected and that the stock of appellant owned by Erie has been held to be without value)?

3. Is the order of a state board requiring appellant, a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act, to continue operating an unprofitable passenger train repugnant to the provisions of the Fourteenth Amendment to the United States Constitution when (a) the only inconvenience resulting from discontinuance would be a delay of from 19 to 28 minutes for a maximum of 145 passengers, (b) such discontinuance would result in an annual saving by appellant of $34,000, and (c) appellant has not discontinued operating any weekday passenger trains since prior to 1939, despite a decline of over 800,000 passengers (on an annual basis) since that time?

Statutes Involved

The decision and order of the New Jersey Board of Public Utility Commissioners is set forth in Appendix "C" hereto. Said decision and order was issued by the New Jersey

Board of Public Utility Commissioners in the exercise of said Board's delegated legislative authority. Said authority is contained in Title 48, Section 2-13 [48 N. J. S. A. § 2-13] and Title 48, Section 12-99 [48 N. J. S. A. § 12-99] of the Revised Statutes of New Jersey, which sections are set forth in Appendix "D" hereto. A question of the interpretation of Section 77 of the Bankruptcy Act is also involved herein and subdivision (c)(2) of said Section [11 U. S. C. § 205(c)(2)] is set forth in Appendix "E" hereto.

Summary of Facts and Rulings

Appellant operates a total of 11 passenger trains, five eastbound which arrive at Jersey City, New Jersey in the morning and six westbound which leave Jersey City, New Jersey in the evening. All these trains make connection with New York City via ferry. Approximately the same number of passengers are carried in each direction and the discontinuance of train No. 613—the first of the six westbound trains leaving Jersey City, New Jersey in the evening—would leave a balanced operation of five trains in each direction. This would result not only in saving the expenses incurred in the westbound operation of the train but also in saving the expenses which are now incurred because of the necessity of returning said train and crew to Jersey City, New Jersey daily so that it can make its westbound trip.

The facts have been summarized in the opinion of the Supreme Court of New Jersey as follows:

> "The facts developed at the hearing below were uncontradicted. Approximately 80% of the stock of the railroad is owned by the Erie Railroad. Since 1938 its business has been conducted by a trustee in reorganization appointed by the United States District Court under section 77 of the Bankruptcy Act, 11 U. S. C. A.

§ 205. During this entire period the railroad as a whole has been operating at a deficit. In 1950 there was a net passenger operating loss of $218,709 and a net freight operating profit of $53,406, leaving a net railway operating loss of $165,303. In that year the net deficit of the railroad after fixed charges was $209,220 and the figures for the first six months of 1951 indicated a larger deficit for that year.

"The average monthly revenue from train 613 is $1,351, while the out-of-pocket operating costs are $4,204 a month, leaving a monthly net operating deficit of $2,853. The number of passengers carried by the railroad has been gradually decreasing in recent years, although figures for the first six months of 1951 show an increase over 1950 in the number of westbound passengers. In fact, train 613 shows an average monthly increase of 13% over 1950. The number of paying passengers carried each trip on train 613 varied from 133 to 145, approximately 95% of whom are commuters.

"The railroad proposed to add the coaches from train 613 to the next westbound train leaving Jersey City at 5:13 P. M., or 28 minutes after train 613, on a schedule which would bring the train into Spring Valley 19 minutes after the presently scheduled arrival time of train 613."

By its decision and order of March 5, 1952, the New Jersey Board of Public Utility Commissioners denied appellant permission to discontinue train 613. It held that appellant "is a subsidiary of the Erie Railroad Company" and stated "we adhere to the view that mere failure to earn a proper return on a line which is part of a system is not sufficient ground for the discontinuance of the service."

Appellant appealed to the Appellate Division of the Superior Court of New Jersey on two grounds. First, it contended that appellant may not be required constitutionally to continue the operation of an unprofitable train when its entire operation is being conducted at a loss. In this

connection, appellant urged that the New Jersey Board of Public Utility Commissioners had erred in holding that appellant is a subsidiary of the Erie Railroad Company and that it is part of the Erie System. Appellant argued that a railroad in reorganization, pursuant to section 77 of the Bankruptcy Act, is not and cannot be a subsidiary of an alleged parent not in reorganization because a railroad in reorganization is subject to the control of the Court and is not subject to the control of any such alleged parent. Appellant pointed out further: the alleged parent, Erie Railroad Company, had filed a petition pursuant to Section 77 of the Bankruptcy Act in the District Court for the Northern District of Ohio in January, 1938; in June, 1938 the alleged subsidiary filed a petition in said reorganization proceeding seeking reorganization "in connection with and as part of" Erie's reorganization; in December, 1940, the Ohio District Court approved a plan providing for the reorganization of Erie but no provision was made for said alleged subsidiary, *In re Erie R. Co.*, Bankruptcy No. 45839, 37 F. Supp 237 (1940, N. D. Ohio); thereafter the proceedings for the reorganization of said alleged subsidiary were dismissed and a petition for reorganization was filed in the District Court for the District of New Jersey; the property of said alleged subsidiary vested in the present trustee as of January 1, 1942 and since that time appellant has been operated as a railroad in reorganization under the jurisdiction of said U. S. District Court for the District of New Jersey; on October 9, 1951, I. C. C. Examiner Bradford found the stock of said alleged subsidiary to be without value; this finding has since been approved by the Interstate Commerce Commission, Division 4,—— I. C. C. —— (Finance Docket 13490, decided March 27, 1953).

In view of the foregoing, appellant pointed out that there was no justification for treating it as a subsidiary of Erie or part of the Erie system, that Erie's profits, if any, were

not being used and could not be used to defray any of appellant's expenses, that its operating loss was its own and not absorbed by Erie, and that in view of this operating loss it could not be required constitutionally to continue to operate this train at a loss. The Appellate Division of the Superior Court of New Jersey passed over the question of whether appellant was a subsidiary of Erie and held that there was no merit to appellant's contention that a railroad which is operating at a loss may not be required constitutionally to continue the operation of an unprofitable service.

As its second ground for appeal before the Appellate Division, appellant argued that the inconvenience which would result to the public as a result of the discontinuance of this train was so small in comparison to the burden placed upon the railroad by the requirement to continue its operation that such requirement would be unreasonable regulation in violation of the Fourteenth Amendment of the United States Constitution. However, the Appellate Division of the Superior Court held that the Utility Board's determination that public convenience and necessity require the continued operation of the train was "not so in conflict with the evidence as to warrant this Court to over-ride it as being unreasonable and unjust."

On further appeal, the Supreme Court of New Jersey also ruled adversely to appellant (by a 4 to 3 decision). It held that it was unnecessary for it to come to grips with the appellant's first contention, viz., that where the entire operation is unprofitable a railroad may not constitutionally be required to perform an unprofitable service, because, in its view, appellant was a subsidiary of the Erie Railroad Company and as such it was obligated (and had failed) to present to the Utility Board proofs of its financial loss beyond those normally required of railroads which are not subsidiaries. It made no reference to appellant's

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point that appellant was not and could not be a subsidiary because it was in reorganization pursuant to Section 77 of the Bankruptcy Act and because of the other reasons mentioned above.

As to appellant's second contention, the Supreme Court of New Jersey stated: "it cannot be said that the inconvenience to the railroad in continuing the operation of train 613 so clearly outweighs the public need that the decision of the Board of Public Utility Commissioners is erroneous."

The Questions Involved Are Substantial

1. In refusing to hold that when the entire operation of a railroad is being conducted at a loss such railroad may not be required constitutionally to continue to render an unprofitable service, the Supreme Court of New Jersey decided an important federal question in a way which conflicts with applicable decisions of this Court. In *Mississippi Railroad Commission* v. *Mobile & Ohio Railroad Company*, 244 U. S. 388, 396 (1917), this Court held that regardless of public convenience, individually unprofitable trains may not be required constitutionally to be continued when the railroad as a whole is experiencing financial difficulties. This case involved a discontinuance of six individual trains. The remaining service on the northern portion of the line was found to be adequate. But that on the southern portion could "not be thought a liberal service" because there remained only "two trains each way in 24 hours and these running at hours *inconvenient* for the transaction of business." Nevertheless, in view of the serious financial condition confronting the railroad as a whole, the requirement that the trains be continued was held to be a deprivation of the railroad's property without due process of law.

Similar decisions have been made by various other courts. *Washington P. & C. Ry. Co.* v. *Magruder*, 198 Fed. 218, 225

(D. Md. 1912); *Matter of Delaware & Hudson R. R. Corp.* v. *Public Service Commission*, 245 App. Div. 66, 281 N. Y. Supp. 155 (3rd Dept. 1935); and *Matter of New York Central R. R. Co.* v. *Public Service Commission*, 257 App. Div. 558, 13 N. Y. S. 2d 614 (3rd Dept. 1939). The same principle has been enunciated in cases involving the discontinuance of service other than that of individual passenger trains, *e. g.*, where it was sought to discontinue one or more of several branch lines of a railroad. *Crawford* v. *Duluth St. Ry. Co.* 60 F. 2d 212, 216 (7th Cir. 1932); *State of Iowa* v. *Old Colony Trust Co.*, 215 Fed. 307, 312, 313 (8th Cir. 1914). See *Columbus Ry. Power & Light Co.* v. *City of Columbus*, 253 Fed. 499 (S. D. Ohio 1918), aff'd 249 U. S. 399 (1919).

The basis for these holdings stems from the well-known right of a railroad to abandon its entire operation when such operation results in a loss.[2] The reasoning is that a different rule should not apply to the abandonment of merely a portion of the operation if there is a possibility of saving the remainder. Since loss on the whole railroad means that no part of it need be operated, the public interest is best served by the continuance of as much of the operation as can reasonably be carried on. Hence, the required continuance of a train or other part of a railroad at a loss which causes such a drain on the entire railroad as may compel it to close down completely of necessity is unreasonable regulation.

While the Supreme Court of New Jersey did not deem it necessary to pass upon this question, it indicated that it felt there was a distinction between a case where the railroad seeks to discontinue its entire business and one where

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[2] *Railroad Commission of Texas* v. *Eastern Texas Railroad*, 264 U.S. 79 (1924); *Bullock* v. *Florida ex rel. Railroad Commission of Florida*, 254 U.S. 513 (1921); *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U.S. 396 (1920).

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it seeks to discontinue only part of its service. But the decisions of this Court support no such distinction, except, perhaps, in those situations where a railroad has undertaken by its charter or contract an absolute duty to provide some service. Where a railroad has undertaken such an absolute duty, some cases seem to hold that a railroad may be required to furnish the service regardless of expense. *Atlantic Coast Line* v. *North Carolina Corporation Commission*, 206 U. S. 1, 27 (1907); *Missouri Pacific Railway Company* v. *Kansas*, 216 U. S. 262 (1910); *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission*, 242 U. S. 603 (1917). However, the language of even these cases, none of which involve situations where the railroad as a whole was operating at a deficit, seems to indicate that despite such absolute duty the amount of the expense or loss involved in the performance of the service may be an important factor to consider. But it is certain that where the railroad has not undertaken any such absolute duty "the question of expense is of more controlling importance." *State of Washington, ex rel. Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 529 (1912); *Atlantic Coast Line R. Co.* v. *Public Service Commission of South Carolina*, 77 F. Supp. 675 (E. D. S. C. 1948). In the instant case, appellant has undertaken no such absolute duty and, as a matter of fact, in the State of New Jersey no such absolute duty is imposed upon any railroad. *Pennsylvania-Reading Seashore Lines* v. *Board of Public Utility*, 5 N. J. 114, 74A 2d 265 (1950). This case overruled *O'Connor* v. *Board of Public Utility Commissioners*, 129 N. J. L. 263 29A 2d 390 (1942), which had held that total discontinuance would be a breach of a contractual duty imposed upon the railroad when it accepted its charter.

Having undertaken no absolute duty to perform the service it is seeking to discontinue, appellant may not be

required to continue rendering such service at a loss when its entire operations are being conducted at a loss. See *Columbus Ry. Power & Light Co.* v. *City of Columbus*, 253 Fed. 499, 505 (S. D. Ohio 1918), *aff'd* 249 U. S. 399 (1919), where it is stated:

> "If there is a binding obligation to maintain and operate a part of a system, it is questionable whether that part or branch can ever be abandoned, unless the losses inflicted by its continued operation are such as will wreck the entire system. On the other hand, if the operation of a railway line cannot be continued, owing to insolvency, a court will not by mandamus or otherwise try to compel its further operation; and this is particularly true, if its continued operation will perform no useful public service."

The philosophy underlying the rule in favor of permitting the discontinuance of an unprofitable service, when the entire operation is being conducted at a loss is probably best summed up in *Williams* v. *Mayor*, 289 U. S. 36, 44-45 (1933), as follows:

> "* * * It is idle to say that a railroad, when once it has been organized, is under a duty to go on, and hence that its distress is not important for anyone except itself. Science has wrought her wonders, but the time is not yet here when trains will run under the impulsion of duty without more. There is room indeed, for question whether even the duty is so absolute as the respondents' argument assumes. Railroad Commission v. Eastern Texas R. Co., 264 U. S. 79, 85. Certain it is, in any event, that operation may end with the consent of the Public Service Commission when the earnings are inadequate. * * * Nor is there need to show a probability of utter cessation or abandonment. Service is likely to be inefficient and even dangerous if operation is continued in the face of an increasing deficit. The state has an interest in seeing to it that railroads

shall be run, but an interest also in how they shall be run."

2. In holding that appellant, a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act, is a subsidiary of Erie, the Supreme Court of New Jersey has decided an important federal question in a way which conflicts with the specific language of subdivision (c)(2) of said Section 77 and with the decision of this court in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 125-27 (1939).

Under subdivision (c)(2) of Section 77 of the Bankruptcy Act, all of the trustee's acts in operating the railroad are subjected to the control of the Bankruptcy Court and in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 127 (1939), this court specifically stated that "the court rather than the stockholders was in control" of a corporation in reorganization. Furthermore—and even apart from its status as an independent railroad because of the provisions of Section 77 of the Bankruptcy Act—the Ohio Bankruptcy Court's rejection of the reorganization of appellant as part of the Erie and the Interstate Commerce Commission's holding that the stock of appellant owned by Erie is without value preclude appellant from being a subsidiary of Erie because they deprive the Erie of its former instruments of control.

Treating appellant as if it were a subsidiary of Erie by requiring it to show that Erie's charges for services and equipment are reasonable impugns the control exercised by the Bankruptcy Court. The imposition of such requirement calls in question the nature of the transactions between Erie and appellant while the latter is acting under the supervision and control of the court. But there is no more reason for so questioning such transactions—and perhaps less in view of the court's control—than there is in the case of transactions between two concededly independent rail-

roads. If evidence of financial deficit such as appellant has presented here had been presented by any such independent railroad, said figures would not have been questioned unless there was positive evidence from the opposition showing that the expenses were not bona fide. No such evidence was presented by the opposition in this case.[3] Appellant has proved its deficit in the same manner as any independent railroad would by showing revenue and expense accounts maintained as prescribed by, and filed with, the Interstate Commerce Commission and the New Jersey Board of Public Utility Commissioners. Requiring more of appellant results in treating it differently than the ordinary independent railroad which incurs similar expenses for services and equipment obtained from another railroad. Such different treatment fails to give effect to the provisions of the Bankruptcy Act which make appellant an independent railroad and amounts to a denial of the equal protection of the laws in violation of the Fourteenth Amendment because it measures the right of appellant to discontinue service by standards which are different from those applied to other independent railroads.

3. In holding that the railroad's burden in continuing the operation of this train does not so outweigh the inconvenience which will result to the public as to amount to unreasonable regulation, the decision of the Supreme Court of New Jersey again conflicts with applicable principles enunciated in the decisions of this Court and other federal courts. In *State of Washington, ex rel Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 529 (1912), this Court held that where a "proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties,

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[3] Since the service and equipment obtained from Erie are not available elsewhere, the reasonableness or unreasonableness of Erie's charges is, in and of itself, immaterial insofar as this proceeding is concerned.

the question of expense is of more controlling importance." In *Atlantic Coast Line R. Co.* v. *Public Service Commission*, 77 F. Supp. 675, 685 (E. D. S. C. 1948), it was held that where the duty sought to be enforced is one of "additional convenience rather than necessity," the question of expense and relative benefit is the deciding factor.

In cases where the discontinuance leaves no remaining train service whatever in the area affected the inconvenience is much more than a mere delay because the passengers must find an entirely new means of transportation. Yet courts have not hesitated to hold even in such cases that an order requiring continued operation was unreasonable and confiscatory. *Ann Arbor R. Co.* v. *Michigan Public Service Commission*, 91 F. Supp. 668 (E. D. Mich. 1950); *Louisville & N. R. Co.* v. *Alabama Public Service Commission*, 94 F. Supp. 893 (M. D. Ala. 1951), *rev'd on other (jurisdictional) grounds*, 342 U. S. 802 (1951). But in the instant case, considerable train service remains. It is undisputed that the only possible inconvenience is a delay of from 19 to 28 minutes for a maximum of 145 passengers—a small number for a commuter train in the populated New Jersey-New York area. The Supreme Court of New Jersey ~~discontinued~~ *dire* bus service as a means of lessening even this small inconvenience on grounds that appellant had not established that available buses are capable of accommodating the 145 additional passengers and that while the bus service out of New York City (whence the majority of the 145 passengers involved commute) serves the entire area served by train 613, the bus service out of Jersey City (where an average of 23 passengers board said train) did not.

But even discounting entirely the availability of bus service as a factor lessening the maximum inconvenience above mentioned—although it is evident that it does lessen it in some degree—such maximum inconvenience certainly

is far outweighed by the burden which the continued operation of this train imposes upon both the railroad and the public. This burden is immediately evident when it is remembered that appellant is a railroad in reorganization pursuant to Section 77 of the Bankruptcy Act, that no weekday passenger train has been discontinued since prior to 1939 despite a decline of over 800,000 passengers carried (on an annual basis) since that time, and that the discontinuance will result in an annual saving of $34,000. Even conceding *(arguendo)* that appellant has not properly established its deficit, appellant's status as a railroad in reorganization over an extended period of time is in itself indicative of its precarious financial condition. To say that the public need necessitates the continuance of this train is to ignore the greater disservice which will be done to the public if the railroad is forced to cease operating entirely because of unsuccessful attempts at reorganization. In view of this, the principles enunciated by this Court in *Mississippi R. R. Commission* v. *Mobile & Ohio R. R. Co.*, 244 U. S. 388, 396 (1917) are peculiarly applicable. This Court there indicated that an order requiring continued train service violates the Fourteenth Amendment even though public inconvenience results from the discontinuance if there are "serious financial conditions confronting the carrier."

Conclusion

The questions presented are substantial and of public importance.

Richard Swan Buell,
Counsel for Appellant.

Justin W. Seymour,
Andrew M. Calamari,
Of Counsel.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF NEW JERSEY

No. A121, September Term, 1952

In the Matter of The Proposal of The New Jersey and New York Railroad Company to Discontinue Operation of Train No. 613 Between Jersey City, New Jersey, and Spring Valley, New York, Effective August 1st, 1951
Argued March 30, 1953; decided May 4, 1953.

On appeal from the Appellate Division of the Superior Court.

Mr. Justin W. Seymour argued the cause for the appellant (Messrs. Seymour & Seymour, attorneys, Messrs. McLanahan, Merritt & Ingraham of the New York bar, on the brief).

Mr. Sam A. Colarusso argued the cause for the respondent Brotherhood of Railroad Trainmen.

Mr. Maurice A. Walsh, Jr. argued the cause for the respondent Boroughs of Park Ridge, Montvale, et al. (Messrs. Fahy & Walsh, attorneys).

The opinion of the Court was delivered by

Vanderbilt, *C. J.*:

This is an appeal from a judgment of the Appellate Division of the Superior Court affirming an order of the Board of Public Utility Commissioners denying permission to The New Jersey and New York Railroad Company to discontinue operation of westbound passenger train No. 613 leaving Jersey City, New Jersey, at 4:45 P. M. daily except Saturdays, Sundays and holidays.

The run in question extends from Jersey City to Spring Valley, New York, a distance of 30.7 miles, of which 7.5 miles extends over the main line of the Erie Railroad while the balance of 23.2 miles is over the tracks of the New Jersey and New York Railroad. There are 22 stations on the line,

including the two terminals, located in 18 different municipalities. The entire run consumes one hour and 22 minutes. The railroad operates five eastbound morning trains arriving at Jersey City between 6:54 A. M. and 8:35 A. M., and six westbound evening trains that depart from Jersey City between 4:45 P. M. and 6:55 P. M.

The facts developed at the hearing below were uncontradicted. Approximately 80% of the stock of the railroad is owned by the Erie Railroad. Since 1938 its business has been conducted by a trustee in reorganization appointed by the United States District Court under section 77 of the Bankruptcy Act, 11 U. S. C. A. § 205. During this entire period the railroad as a whole has been operating at a deficit. In 1950 there was a net passenger operating loss of $218,709 and a net freight operating profit of $53,406, leaving a net railway operating loss of $165,303. In that year the net deficit of the railroad after fixed charges was $209,220 and the figures for the first six months of 1951 indicated a larger deficit for that year.

The average monthly revenue from train 613 is $1,351, while the out-of-pocket operating costs are $4,204 a month, leaving a monthly net operating deficit of $2,853. The number of passengers carried by the railroad has been gradually decreasing in recent years, although figures for the first six months of 1951 show an increase over 1950 in the number of westbound passengers. In fact, train 613 shows an average monthly increase of 13% over 1950. The number of paying passengers carried each trip on train 613 varied from 133 to 145, approximately 95% of whom are commuters.

The railroad proposed to add the coaches from train 613 to the next westbound train leaving Jersey City at 5:13 P. M., or 28 minutes after train 613, on a schedule which would bring the train into Spring Valley 19 minutes after the presently scheduled arrival time of train 613.

The application was opposed by representatives of several of the municipalities involved as well as by the Brotherhood of Railroad Trainmen, some of whose members would be affected if the application were granted. After formal

hearings the Board of Public Utility Commissioners denied the application, holding that:

> "In passenger train cases, our primary considerations must be the requirements of public convenience and necessity for continuation of a service. In respect to such service we adhere to the view that mere failure to earn a proper return on a line which is part of a system is not sufficient ground for discontinuance of a service.
>
> "On the record before us we find:
>
> "(1) that considerable public opposition to discontinuance of train No. 613 prevails in the communities on the line;
>
> "(2) that no material change in the circumstances attending the operation of train No. 613 has occurred since our prior Decision in the matter of November 9th, 1950;
>
> "(3) that five (5) westbound evening trains would not provide adequate and proper service; and
>
> "(4) that public convenience and necessity require continuance of the operation of train No. 613."

The decision of the board was affirmed by the Appellate Division.

In its appeal the railroad first contends that since its operations are being conducted at a loss the requirement that it continue to operate train 613 is unreasonable and confiscatory and thus a deprivation of its property without due process of law in violation of its rights under the United States Constitution. It is well settled that a state through an administrative agency may regulate the services and facilities of a public utility in the public interest, but such power is at all times limited by the provisions of the Constitution so that services and facilities not reasonably needed in the public interest cannot be required. It is equally clear that the mere fact that the operation of a particular train results in a pecuniary loss to the railroad does not of itself establish a right to its discontinuance. In Pennsylvania-Reading Seashore Lines v. Board of Public

Utility Commissioners, 5 N. J. 114, 74 A. 2d 265, 269 (1950), we held that a railroad cannot constitutionally be forced to furnish service which is not required by public convenience and necessity, but at the same time we stated that "The mere fact that a given railroad or branch or train is operating at a loss will not of itself justify suspension of any service." In Pennsylvania Railroad Company v. Board of Public Utility Commissioners, 11 N. J. 43, 93 A. 2d 339 (1952), the Board of Public Utility Commissioners denied an application to discontinue four local commuter trains, finding among other things that the failure to earn an adequate return from the passenger service on the line was not of itself sufficient reason for the discontinuance of these four trains. On appeal we affirmed. In Chesapeake & Ohio R. Co. v. Public Service Commission of West Virginia, 242 U. S. 603, 37 S. Ct. 234, 61 L. Ed. 520 (1917), the railroad instituted proceedings to set aside an order requiring it to maintain daily passenger service on a branch line, claiming a violation of due process and equal protection under the 14th Amendment of the United States Constitution because of the pecuniary loss attendant upon such passenger service. In its opinion the United States Supreme Court stated:

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss."

In Alabama Public Service Commission v. Southern Railway Company, 341 U. S. 341, 347, 71 S. Ct. 762, 767, 95 L. Ed. 1002, 1007 (1951), Chief Justice Vinson stated:

> "The problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the

service rendered. Chesapeake & Ohio R. Co. v. Public Service Com. of West Virginia, 1917, 242 U. S. 603, 608, 37 S. Ct. 234, 61 L. Ed. 520 [523]."

See Atlantic Coast Line Railroad Company v. North Carolina Corporation Commission, 206 U. S. 1, 26, 27 S. Ct. 585, 51 L. Ed. 933, 959 (1907); Mississippi Railroad Commission v. Mobile & Ohio Railroad Company, 244 U. S. 388, 391, 37 S. Ct. 602, 61 L. Ed. 1216, 1219 (1917); Pennsylvania Railroad Company v. Board of Public Utility Commissioners, 11 N. J. 43, 51, 93 A. 2d 339 supra.

The railroad argues, however, that the result is different where the entire operation of the company is also conducted at a loss. In that situation it claims that the State cannot constitutionally require the railroad to continue its entire operation or perhaps even a branch thereof; therefore it claims that constitutionally it cannot be required to operate a single train at a loss. This contention overlooks the distinction between regulatory powers of a state over a railroad operating in the state and a railroad's right to go out of business. Railroad Commission of Texas v. Eastern Texas Railroad Company, 264 U. S. 79, 85, 44 S. Ct. 247, 248, 68 L. Ed. 569, 572 (1924), involved the right of a railroad to dismantle and abandon its road. The United States Supreme Court upheld the railroad's right to withdraw from intrastate commerce and to abandon the road saying:

"The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law."

But in discussing a situation where the railroad continued to operate under its charter the court also stated:

> "So long as the railroad company 'continues to exercise' the privileges conferred by its charter, the state has power to regulate its operations in the interest of the public, and to that end may require it to provide reasonably safe and and adequate facilities for serving the public, even though compliance be attended by some pecuniary disadvantage."

See Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323 (1920).

A determination of this question, however, is unnecessary since the railroad has failed to prove a loss in its entire business or in its operation of train 613. In the record before us the railroad made no attempt to justify expenditures. For instance, in connection with the Erie Railroad we find no proof of the reasonableness of the sums paid to Erie as rent for rolling stock and other equipment or for use of its tracks. Moreover, although there was considerable evidence of intermingling of employees between the New Jersey and New York Railroad and the Erie Railroad there was no evidence of the reasonableness of the allocation of salaries paid to the same employees by the two companies. There was also testimony that train 632, which is the return train for 613, carried freight on its so-called "ghost ride" back to Jersey City. But although the operating cost of this run was charged to train 613, it does not appear that any of its freight revenue was credited thereto.

In a situation such as this where the public utility is an 80%-owned subsidiary of the parent company it is incumbent upon the subsidiary to prove the reasonableness of its expenditures and the accuracy of its accounts. This is especially true where there is extensive intermingling of employees and where the subsidiary is to a large extent dependent upon the parent for rental of its equipment. Inasmuch as the railroad's operating loss, both as to its entire system and as to the particular train in question, is a factor to be considered by the board, the railroad has the

duty to present proof of the propriety of its expenditures and to establish that its operating deficiency is *bona fide*.

Secondly, the railroad contends that the proofs submitted were such that the board should have found that the public convenience and necessity did not require the continued operation of train 613. In other words, it argues that the board's decision was unreasonable since the operating loss to the railroad outweighed any public inconvenience that might arise from the discontinuance of the train. This contention cannot be sustained. First of all, one of the important elements to be considered where public convenience and necessity is the test is the financial success of the railroad as a whole as well as of the particular train sought to be discontinued. Yet, as stated above, the railroad has completely failed to establish the existence of its alleged operating deficits for both the entire railroad and train 613.

Furthermore, in arriving at its decision the board must be governed by the test of public convenience and necessity. In this regard the local factor of public need of the services rendered is the predominating and controlling element. Pennsylvania Railroad Company v. Board of Public Utility Commissioners, 11 N. J. 43, 51, 93 A. 2d 339 (1952) supra; Alabama Public Service Commission v. Southern Railway Company, 341 U. S. 341, 347, 71 S. Ct. 762, 95 L. Ed. 1002, 1007 (1951), supra. The proofs reveal that the area served by train 613 is increasing in population, that some 133 to 145 revenue passengers are carried daily, that the average number of passengers carried in the first half of 1951 was an increase of 13% over 1950. The elimination of train 613 will entail a 19 to 28 minute delay for passengers in arriving at their destination after their day's work. The railroad claims that this delay is not substantial, but it failed to produce any evidence in support of this contention.

Finally, it contends that there is adequate bus service to compensate for the discontinuance of the train. We fail to find adequate proof of this in the record before us. The only evidence of the bus situation was presented by Mr. Krom, general passenger agent for the railroad, who testified that he made observations at a bus terminal in New York City and in Jersey City, in which general areas it is assumed that the large majority of passengers on train 613

are employed. He stated that between the hours of 4:15 P.M. and 5:15 P.M. "none of these buses were crowded, and each had quite a few empty seats," that they were "not loaded to capacity," that there were "quite a few vacant seats," and that he observed "some bus operations with 45 seat capacity where they were handling between 22 and 27 or 28 passengers." Such testimony falls short of showing that these buses were capable of accommodating the 133 to 145 revenue passengers served by train 613. Moreover, the statement of bus departures from New York City and Jersey City to the area serviced by train 613 prepared by Mr. Krom shows that buses from Jersey City, the terminal of train 613, cover trips to only four of the 17 municipalities, excluding Jersey City, served by the train.

In this posture of the proofs it cannot be said that the inconvenience to the railroad in continuing the operation of train 613 so clearly outweighs the public need that the decision of the Board of Public Utility Commissioners is erroneous. The judgment of the Appellate Division of the Superior Court is therefore affirmed.

For affirmance: Chief Justice Vanderbilt and Justices Oliphant, Wachenfield and Burling—4.

For reversal: Justices Heher, Jacobs and Brennan—3.

Dissenting Opinion

William Brennan, Jr., J. (dissenting).

I fully agree that in this type of case "the Board must be governed by the test of public convenience and necessity," but in the circumstances here I think both the Board of Public Utility Commissioners and the majority unduly emphasize the inconvenience of the passengers of train 613 at the expense of the larger public interest in the continuance of the overall operation of this railroad. The majority sustains the finding of the board that there was public need requiring the continuance of the operation of train 613 in that otherwise the passengers using it must suffer the inconvenience of a 19- to 28-minute delay in arriving at their destinations after their day's work. However, the record suggests that both the entire railroad and the train have

long been and are and probably will continue to be operated at substantial annual deficits. In such case there looms the prospect of an even more undesirable disservice to the public interest, namely, the discontinuance of the operation of the railroad and of all of its trains. The railroad cannot of course be asked to go on indefinitely as a losing venture. It does not seem to me that the board gave adequate, if indeed any, consideration to that fact and to the possibility of the eventuality that the railroad may go out of business, and whether this greater threat to the public need does not require relief to the road to avert that prospect, either by granting the application notwithstanding the resultant inconvenience to the passengers of train 613 or by the allowance of some alternate form of relief in the way of curtailment of other service or rearrangement of the entire service to effect a saving of expense. The relative importance of the larger public interest is shown by the fact that the discontinuance of this one train, according to the railroad's figures, would effect a reduction of some 20% in the railroad's overall net operating loss.

I agree with the majority, however, that the railroad did not sustain its burden to present proof of the propriety of its expenditures and to establish that its operating deficit is bona fide, and agree also that in this regard the relationship of the applicant with Erie necessarily implicates both the bona fides and the reasonableness of the expenses charged or allocated by Erie to the applicant. I would reverse and remand to the board for a further hearing with direction that if the bona fides and reasonableness of the claimed continuing deficits are established, there be granted such relief as reasonably may be allowed consistent with a proper balancing of the several elements of public interest involved.

This dissent is joined in by Justice JACOBS.

APPENDIX "B"

OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

A 445-51

In the Matter of the Proposal of The New Jersey and New York Railroad Company to Discontinue the Operation of Train #613

Argued October 14, 1952.

Before Judges Freund, Stanton and Conlon.

Mr. Justin W. Seymour (Seymour & Seymour, Attorneys for Peter Duryea, Trustee of the property of the New Jersey and New York Railroad Company) argued the cause for the Appellant.

Mr. Maurice A. Walsh (Fahy & Walsh, Attorneys for the Borough of Park Ridge, Montvale, Oradell and River Edge) argued the cause for the Respondents.

Mr. Sam. A. Colarusso argued the cause for the Brotherhood of Railroad Trainmen.

The opinion of the Court was delivered by

Conlon, *J. C. C.* (Assigned):

Peter Duryea, Trustee of the property of the New Jersey and New York Railroad Company (hereinafter referred to as the Railroad) appeals from an order of the Board of Public Utilities Commissioners dated March 5, 1952, denying permission to discontinue the operation of the westbound evening train #613 which leaves Jersey City at 4:45 P. M. daily except Saturdays, Sundays and holidays.

The operation of the train has had prior consideration by the Utility Board. On November 9, 1950, an application of the Railroad, the Board permitted it to discontinue the operation of Train #632 which was a non-passenger train operating as the return (eastbound) movement of Train #613, and, without prejudice, denied permission to discontinue Train #613. An application for a re-hearing was

denied on May 17, 1951. The present application was instituted by a letter of the Railroad dated June 20, 1951.

The Railroad extends in a northerly direction from a connection with the Erie Railroad 1.3 miles south of Carlstadt to Spring Valley, New York, a distance of 23.2 miles. It owns no rolling stock or motive power, and under an agreement with the Erie Railroad the latter's equipment is operated between Jersey City and Spring Valley, a distance of 30.7 miles, i. e. 7.5 miles over the main line of the Erie and 23.2 miles over its own line. It has been in reorganization since June 30, 1938 under Section 77 of the Bankruptcy Act, until 1941 in the District Court for the Northern District of Ohio and since then in the District Court for the District of New Jersey.

The Railroad contends on this appeal that the finding of the Utilities Board was erroneous in two respects, one as to the law and the other as to the facts. Its first contention is that since its entire operation is being conducted at a loss, the requirement that it continue the operation of a train which is unprofitable and which contributes heavily to that loss is unreasonable and confiscatory. It thus projects the contention that where the entire operation of a railroad is carried on at a loss, it has the right to discontinue a train which is itself unprofitable without regard to the element of public convenience and necessity, and it argues that a contrary conclusion would be an invasion of its constitutional rights in that the enforced operation of the train would constitute confiscation of its property without due process. Many cases are cited in support of the proposition. Railroad Commission of Texas v. Eastern Texas Railroad, 264 U. S. 79, 44 Sup. Ct. 247 (1924); Bullock v. Florida ex rel Railroad Commission of Florida, 254 U. S. 513, 41 Sup. Ct. 193 (1921); Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396; 40 Sup. Ct. 183 (1920); Mississippi Railroad Commission v. Mobile & Ohio R. R., 244 U. S. 388, 37 Sup. Ct. 602 (1917); Crawford v. Duluth St. Ry. Co., 60 F. 2d 212 (7 Cir. 1932); State of Iowa v. Old Colony Trust Co., 215 Fed. 312 (8 Cir. 1914). A review of these cases discloses that none of them bears out the appellant's contention. Most of them present situations in which

the Railroad was seeking the discontinuance of an unprofitable branch line. The others are cases in which the degree of public convenience and necessity was weighed against the financial loss to the railroad.

The appellant also urges as authority the decision in Pennsylvania-Reading Seashore Lines v. Board of Public Utility Commissioners, 5 N. J. 114 (1950). In that case the railroad applied to discontinue the operation of two trains, one running in each direction between Woodbury and Penns Grove, a branch line of the railroad. They were the only passenger trains operated by the railroad on the branch and apparently had been kept running so that the road might not subject itself to the forfeiture of its franchise, it appearing that the branch conducted a profitable freight business. The trains carried five or six passengers each, and the Utility Board made a factual finding to the effect that public convenience and necessity did not require their continuance, but declined to order their abandonment under the principle established in O'Connor v. Board of Public Utility Commissioners, 129 N. J. L. 263 (E & A 1942) which held that the railroad by reason of its franchise had a contractual obligation to the State to operate some passenger service and the Utility Board was without jurisdiction to erase this obligation from the railroad's agreement. In reversing the O'Connor case, speaking for the court, Chief Justice Vanderbilt held:

> "It was specifically found by the Board after a public hearing on due notice that the continued operation of such service was not required by public necessity or convenience. Its order was founded solely on the ground that the decision in the O'Connor case left the Board without discretion; that under the statutes as there construed it was mandatory for the railroad to continue to operate passenger trains, even though such operation was entirely unnecessary and could only be carried on at a continued and substantial loss. If the situation were such that the branch line was serving a real public need of passengers or the railroad as a whole was making a profit although this particular branch was operating at a loss, the problem would be

an entirely different one; in either of these events, to order the railroad to continue service might not be arbitrary and unreasonable in view of all the circumstances. But here the branch line serves no public need for passenger service and not only the branch line but the entire railroad has been operating at a loss for a considerable number of years."

This determination is not applicable to the present situation. In the first place there was found a complete lack of the element of public convenience and necessity, and further than that there was involved the discontinuance of all of the passenger service on a branch line. Here there is involved the discontinuance of a single train on the railroad's main and only line. This latter distinction has far deeper implications than might at first seem apparent.

If the application here were to discontinue all passenger service on the ground that the entire operation of the railroad was unprofitable, it seems that it would become incumbent on the Utility Board to examine into all of the financial affairs of the railroad, particularly that phase of them which relates to its contractual relationship with the Erie Railroad and the reasonableness of the rental and other charges paid under the agreement with the Erie. It might well also examine into the degree of control which the Erie exercises by reason of the ownership of most of its stock. No such inquiries were made or required for the purpose of the present application.

To extend the principle that the Utility Board may permit the suspension of all of the passenger service of an entire line on the sole ground that it is operating at a loss to a determination that the Board must permit the discontinuance of a single train on the sole ground that the train is unprofitable and the railroad is operating at a loss would create an anomolous situation. The result would be that any railroad could as a matter of right discontinue any unprofitable train if its entire operation showed a loss. Hence the appellant would be empowered, if this application were granted on the ground urged, to discontinue any other unprofitable trains it chose and confine its operation only to

profitable trains at the same time ignoring all aspects of the public convenience and necessity involved.

The record before us indicates that, without giving consideration to the reasonableness of the terms of the agreement between the Erie Railroad and the appellant, for the year 1951, the railroad sustained a net passenger railway operating loss of $218,709. and had a net freight operating income of $53,406. leaving a net railway operating loss of $165,303. The annual out-of-pocket loss involved in the operation of Train #613 is about $34,000. Obviously, the discontinuance of the train in question, while it will reduce the operating loss by some 20%, will fall far short of removing the railroad's net operating loss. It may be presumed that if this court were to hold under the circumstances here presented that the railroad has, as it contends it has, the right to discontinue any unprofitable train, it would proceed to discontinue other unprofitable trains by mere notice to the Utility Board which would perforce be compelled to concur in the discontinuance without being able to give consideration to any of the other elements that are generally recognized as being material to the maintenance of service in accord with the public convenience and necessity. Thus the Utility Board would be shorn of the power and obligation delegated to it by the legislature to regulate service in the public interest. The adoption of the novel principle urged by the appellant would, in effect, result in the assumption by the court of the regulatory obligations of the Utility Board. The denial of the application by the Utility Board on this ground was proper.

The railroad is not without remedies to preserve its constitutional rights. If its operation is so financially unsound as to require either a discontinuance of all service or a material revamping of its time-table with a view of curtailing out-of-pocket losses which it cannot absorb indefinitely, it may be that an entirely new plan of operation should be presented so that the Utility Board may consider it in accordance with its regulatory obligations.

The Railroad further contends that under the proofs submitted, the public convenience and necessity do not warrant the Board in refusing to permit the discontinuance of the

train in question. In the resolution of that contention it is proper to take into consideration both the out-of-pocket loss incident to the operation of the train and the degree of public convenience and necessity involved. But in weighing the relative importance of out-of-pocket loss and public convenience and necessity, this court is bound by the principle that it was the duty of the Board to give primary consideration to the latter. (Colorado v. United States, 2171 U. S. 153 at pages 162 and 168, 46 Sup. Ct. 452)-(1926). Furthermore, consideration must be given to the fact that the Utility Board is a quasi-judicial agency for which reason if, after due hearing, it passes upon a question of fact within its jurisdiction and with the determination of which it is charged by statute, its findings are not to be reversed unless unwarranted in law or unfounded in fact, or unless a discretionary power has been plainly abused. Rahway Valley R. R. Co. v. Board of Public Utility Commissioners, 127 N. J. L. 164 (Sup. Ct. 1941); N. J. Power and Light Co. v. Butler, 4 N. J. Super, 270 (App. Div. 1949).

On the question of public convenience and necessity the facts found by the Board do not differ materially from the contentions of the appellant. It appears that Train #613 leaves Jersey City at 4:45 P. M. and arrives at its terminus at Spring Valley at 6:07 P. M. It makes twenty intermediate stops and is the only train giving comparable service between 2:13 P. M. and 5:13 P. M. It carries about 144 fare-paying passengers per day. The monthly revenue derived from handling passengers, newspapers, mail and express amounts to approximately $1351. Without giving consideration to the reasonableness of the rental and other charges imposed by the Erie Railroad, the out-of-pocket cost of operating the train averages about $4,204. a month so that the revenue, according to the company's figures, is some $2,853. per month less than the out-of-pocket expense. However an analysis by the Board of the company's passenger count indicates that the number of passengers carried in 1951 showed a monthly average of 4,650 as against 4,123 in 1950 or an increase of about 13%.

The railroad suggests that the passengers who presently use Train #613 could be accommodated on Train #615

which leaves Jersey City 28 minutes later and would be speeded up so as to make a somewhat faster trip. It also points out that parallel bus service is available.

No formula can be devised to determine how many passengers are necessary to establish whether or not the operation of a particular train is within the bounds of public convenience and necessity. In this case the Board determined that the number was sufficient. It arrived at that determination in accordance with its legislative obligation to consider not only the convenience and necessity of the public but the welfare of the railroad itself, The determination of the Utility Board is not so in conflict with the evidence as to warrant this court to over-ride it as being unreasonable and unjust.

The order of the Board of Public Utility Commissioners is affirmed.

APPENDIX "C"

DECISION OF THE BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE DEPARTMENT OF PUBLIC UTILITIES OF THE STATE OF NEW JERSEY

No. 5,659

In the Matter of the Proposal of the New Jersey and New York Railroad Company to Discontinue Operation of Train #613 Between Jersey City, New Jersey, and Spring Valley, New York, Effective August 1st, 1951

Richard Swan Buell and Andrew M. Calamari, for Trustee of The New Jersey and New York Railroad Company.

Dominick Fondo, for City of Hackensack, Borough of Hasbrouck Heights and Township of South Hackensack.

David P. Kuehne, for Borough of River Edge.

Leon Behr, for Boroughs of Park Ridge, Montvale and Oradell.

Francis X. Fahy, for City of Jersey City and Boroughs of Park Ridge, Montvale and Oradell.

F. C. Mooney as a taxpayer of the State of New Jersey and for Brotherhood of Railroad Trainmen.

Henry B. Schmidt, for Brotherhood of Railway Clerks.

G. F. Conway, for Order of Railway Conductors.

C. F. Cook, for Brotherhood of Locomotive Firemen and Enginemen.

Raymond F. Schnabel, for Railway Carmen.

By the Commission:

The New Jersey and New York Railroad Company, through Mr. H. A. Bookstaver, Superintendent, in letter dated June 20th, 1951, notified us that on August 1st, 1951, it proposed to discontinue the operation of westward evening train #613 which leaves Jersey City daily except Saturdays, Sundays and holidays at 4:45 P. M. and is scheduled to arrive at Spring Valley, New York, its terminus, at 6:07 P. M.

The discontinuance of train #613 has been the subject of formal proceedings before us recently. During July 1950, public hearings were held on a similar proposal. At that time, in a Decision dated November 9th, 1950, in Docket No. 5143, we denied permission to discontinue the train. Subsequently, the Railroad Company filed a petition for a rehearing and redetermination of the matter. After oral argument on the petition the Board, in a Memorandum dated May 17th, 1951, in Docket No. 5143, denied a rehearing and dismissed the petition.

On July 32rd, 1951, the Board notified The New Jersey and New York Railroad Company that its proposal to discontinue the operation of train #613 on August 1st had been placed on the Board's Calendar for public hearing.

Hearings upon notice to parties in interest and of record and by posting in the train and at stations on the line were held in Newark on October 31st, November 19th and December 10th, 1951, when all who appeared were heard or afforded an opportunity to be heard.

The proposal to discontinue train #613 was opposed by representatives of several of the communities located along

the line, as well as commuters and several organizations of railroad trainmen and a taxpayer.

The New Jersey and New York Railroad extends in a northerly direction from a connection with the Erie Railroad at New Jersey and New York Junction, 1.3 miles south of Carlstadt to Spring Valley, New York, a distance of 23.2 miles. It passes through Carlstadt, Wood Ridge-Moonachie, Hasbrouck Heights, Hackensack, North Hackensack, River Edge, New Milford, Oradell, Emerson, Westwood, Hillsdale, Woodcliff Lake, Park Ridge and Montvale in New Jersey and Pearl River and Nanuet in New York, where intermediate stations are located.

From our records it appears that The New Jersey and New York Railroad Company owns no rolling stock or motive power and that, under an agreement, equipment of the Erie Railroad Company is operated between Jersey City and Spring Valley, a distance of 30.7 miles, over the Main Line of the Erie between Jersey City and the New Jersey and New York Junction (7.5 miles) and over the Main Line of the New Jersey and New York Railroad between New Jersey and the New York Junction and Spring Valley (23.2 miles).

The present westbound passenger train schedules operated between Jersey City and Spring Valley and intermediate stations and those proposed by the respondent are as follows:

PRESENT WESTBOUND SCHEDULES

	680	613	615	617	693	*619	623	**625
		Daily exc. Sat.	Daily exc. Sat.	Daily exc. Sat.		Daily exc. Sat.	Daily exc. Sat.	Daily exc. Sat.
	Sat. Only	Sun. & Hol.	Sun. & Hol.	Sun. & Hol.	Sat. Only	Sun. & Hol.	Sun. & Hol.	Sun. & Hol.
	pm	pm	pm	pm	pm	pm	pm	pm
Jersey City	2:25	4:45	5:13	5:30	5:25	5:42	6:04	6:55
Carlstadt	2:42	5:01			5:41	5:58	6:20	7:11
Wood Ridge-Moonachie	2:44	5:03	5:29		5:44	6:01	6:23	7:13
Hasbrouck Heights	2:46	5:05	5:31		5:46	6:04	6:26	7:16
Williams Avenue	f2:48	5:07			f5:48	6:06	6:28	7:18
Hackensack	2:51	5:09			5:51	6:09	6:31	7:21
Central Avenue	2:54	5:11			5:54	6:11		7:23
Anderson Street	2:58	5:13	5:36		5:58	6:13	6:34	7:25
Fairmont Avenue	3:00	5:15	5:38		6:00	6:15	6:36	7:27
No. Hackensack	3:03	5:18	5:40		6:03	6:18	6:39	7:29
River Edge	3:06	5:21	5:43	5:56	6:06	6:21	6:42	7:32
New Milford	3:08	5:24	5:45	5:58	6:08	6:24	6:45	7:34
Oradell	3:10	5:26	5:48	6:01	6:11	6:27	6:48	7:37
Emerson	3:13	5:29		6:04	6:13	6:30	6:51	7:40
Westwood	3:16	5:33	5:53	6:07	6:16	6:33	6:54	7:43
Hillsdale	3:20	5:36	5:55	6:10	6:20	6:36	6:57	7:46
Woodcliff Lake	3:23	5:40	6:00	6:14	6:23	6:40	7:01	7:50
Park Ridge	3:26	5:44	6:03	6:17	6:26	6:43	7:04	7:53
Montvale	3:28	5:48	6:07	6:20	6:28	6:46	7:07	7:55
Pearl River	3:31	5:51	6:10	6:24	6:32	6:49	7:10	7:59
Manuet	3:36	5:56	6:15	6:29	6:37	6:54	7:15	8:04
Spring Valley	3:47	6:07	6:26	6:36	6:43	7:05	7:26	8:15

(Notes: f—Flag stop.
*—Will operate Oct. 12, Election Day, Feb. 12 and 22.
**—Will operate Oct. 12, Election Day, and Feb. 12.)

PROPOSED WESTBOUND SCHEDULES

	689	615	617	693	*619	623	**625
	Sat. Only	Daily exc. Sat. Sun. & Hol.	Daily exc. Sat. Sun. & Hol.	Sat. Only	Daily exc. Sat. Sun. & Hol	Daily exc. Sat. Sun. & Hol.	Daily exc. Sat. Sun. & Hol
	pm	pm	pm	pm	pm	pm	pm
Jersey City	2:25	5:13	5:30	5:25	5:42	6:04	6:55
Carlstadt	2:43	5:28		5:41	5:58	6:20	7:11
Wood Ridge-Moonachie	2:44	5:30		5:44	6:01	6:23	7:13
Hasbrouck Heights	2:46	5:32		5:46	6:04	6:26	7:16
Williams Avenue	f2:48	5:34		f5:48	6:06	6:28	7:18
Hackensack	2:51	5:37		5:51	6:09	6:31	7:21
Central Avenue	2:54			5:54	6:11		7:23
Anderson Street	2:58	5:39		5:58	6:13	6:34	7:25
Fairmont Avenue	3:00	5:41		6:00	6:15	6:36	7:27
North Hackensack	3:03	5:43		6:03	6:18	6:39	7:29
River Edge	3:06	5:46	5:56	6:06	6:21	6:42	7:32
New Milford	3:08	5:48	5:58	6:08	6:24	6:45	7:34
Oradell	3:10	5:51	6:01	6:11	6:27	6:48	7:37
Emerson	3:13	5:54	6:04	6:13	6:30	6:51	7:40
Westwood	3:16	5:57	6:07	6:16	6:33	6:54	7:43
Hillsdale	3:20	5:59	6:10	6:20	6:36	6:57	7:46
Woodcliff Lake	3:23	6:03	6:14	6:23	6:40	7:01	7:50
Park Ridge	3:26	6:06	6:17	6:26	6:43	7:04	7:53
Montvale	3:28	6:08	6:20	6:28	6:46	7:07	7:55
Pearl River	3:31	6:11	6:24	6:32	6:49	7:10	7:59
Manuet	3:36	6:16	6:29	6:37	6:54	7:15	8:04
Spring Valley	3:47	6:26	6:36	6:43	7:05	7:26	8:15

(Notes: f—Flag stop.
*—Will operate Oct. 12, Election Day, Feb. 12 and 22.
**—Will operate Oct. 12, Election Day and Feb. 12.)

No changes are proposed for the eastbound passenger train schedules.

The respondent Railroad Company offered testimony and exhibits in respect to the number of passengers carried on train #613 and the revenue derived from and the cost of operating it. The exhibits show that in the period June 25th-29th, 1951, the number of revenue passengers per trip on train #613 was:

	No. of Revenue Passengers
Monday, June 25th	134
Tuesday, June 26th	144
Wednesday, June 27th	145
Thursday, June 28th	138
Friday, June 29th	166
Total	727
Average per trip	145
The passenger revenues from train #613 during this period amounted to	$254.92

In the period September 10th-14th, 1951, the number of revenue passengers per trip on train #613 was shown to be:

	No. of Revenue Passengers
Monday, September 10th	132
Tuesday, September 11th	137
Wednesday, September 12th	138
Thursday, September 13th	123
Friday, September 14th	133
Total	663
Average per trip	133
The passenger revenues from train #613 during this period amounted to	$227.87

In the period November 13th-16th, 1951, the number of revenue passengers per trip on train #613 was shown to be:

	No. of Revenue Passengers
Tuesday, November 13th	151
Wednesday, November 14th	144
Thursday, November 15th	141
Friday, November 16th	138
Total	574
Average per trip	144

Exhibits show that the monthly revenue derived from handling passengers, newspapers, mail and express on train #613 amounts to approximately $1,351, and the out-of-pocket cost of operating the train was shown to average $4,204 a month, so that revenue, according to the Company exhibits, is $2,853 less than the out-of-pocket cost of operating the train.

The exhibits show that the number of passengers carried on the New Jersey and New York Railroad has been gradually decreasing in recent years. The approximate number of passengers per month served on each of the six westbound evening trains during the past four years was shown to have been as follows:

Westbound Trains

	#613	#615	#617	#619	#623	#625
1948	6,925	11,180	18,214	8,732	7,765	4,520
1949	6,456	10,113	17,202	8,973	7,367	3,103
1950	4,123	8,459	16,870	7,919	6,329	2,592
1951	4,650	8,556	17,236	8,552	6,785	2,894

Financial results of operation of the entire New Jersey and New York Railroad from January 1st, 1946, to June 30th, 1951, taken from Exhibit P-21, have been:

Year	Income
1946	$258,476 Deficit
1947	195,524 Deficit
1948	234,407 Deficit
1949	341,801 Deficit
1950	209,220 Deficit
1951—Jan. to June, inclusive	116,231 Deficit

The representatives of the communities entered objections of a general nature to the discontinuance of train #613, and two witnesses, testifying on behalf of the objectors, contended that effectuation of the proposal would adversely affect the communities by retarding their development and discouraging newcomers. It would also inconvenience the regular riders or commuters who use the train.

Conclusions

We have given careful consideration to the testimony and exhibits offered in this proceeding. The respondent Railroad Company has for a number of years operated, daily except Saturdays, Sundays and holidays, five (5) eastbound morning trains which arrive in Jersey City over a period of one hour and forty-five minutes, between 6:54 A.M. and 8:35 A.M., and six (6) westbound evening trains which depart from Jersey City over a period of two hours and ten minutes, between 4:45 P.M. and 6:55 P.M. Discontinuance of train #613, the first westbound train in the evening, as proposed, would leave five (5) westbound evening trains departing from Jersey City over a period of one hour and forty-two minutes, between 5:13 P.M. and 6:55 P.M., or service comparable to that provided by the eastbound trains in the morning.

The evidence submitted to us at hearings in July and September of 1950 on a similar proposal, showed that train #613 at that time was handling an average of about 170 passengers a trip and that it was being operated at an out-of-pocket loss of approximately $2,248 a month. The record now before us reflects no material change in the foregoing statistics. The number of passengers per trip averaged 145, 133 and 144 in tallies taken during representative weeks in June, September and November, 1951. The out-of-pocket loss in operating the train now approximates $2,853 a month.

The operations of the respondent, both passenger and freight, reflect continuing deficits. Our records show that The New Jersey and New York Railroad Company is in process of reorganization in the United States District Court under Section 77 of the Bankruptcy Act and that the re-

spondent is a subsidiary of the Erie Railroad Company.

In passenger train cases, our primary considerations must be the requirements of public convenience and necessity for continuation of a service. In respect to such service we adhere to the view that mere failure to earn a proper return on a line which is part of a system is not sufficient ground for discontinuance of a service.

On the record before us we find:

(1) that considerable public opposition to discontinuance of train #613 prevails in the communities on the line;

(2) that no material change in the circumstances attending the operation of train #613 has occurred since our prior Decision in the matter of November 9th, 1950;

(3) that five (5) westbound evening trains would not provide adequate and proper service; and

(4) that public convenience and necessity require continuance of the operation of train #613.

In accordance with its findings, the Board hereby denies permission to respondent, The New Jersey and New York Railroad Company, to discontinue the operation of westbound evening train #613 which leaves Jersey City at 4:45 P.M. daily except Saturdays, Sundays and holidays.

Dated: March 5, 1952.

BOARD OF PUBLIC UTILITY COMMISSIONERS,
By (Signed) JOHN E. BOSWELL,
[SEAL.] *President.*

Attest:
(Signed) EMMETT T. DREW,
[SEAL.] *Secretary.*

I hereby certify the foregoing to be a true copy of a Decision rendered by the Board of Public Utility Commissioners and ordered filed by said Board.

(Signed) D. LANE POWERS,
Commissioner.

APPENDIX "D"

PERTINENT SECTIONS OF RELEVANT NEW JERSEY STATUTE

Title 48, Section 2-13 [48 N. J. S. A. § 2-13] of the Revised Statutes of New Jersey provides:

"The board shall have general supervision and regulation of and jurisdiction and control over all pubilc utilities as hereinafter in this section defined and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Title.

"The term 'public utility' shall include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control within this State any steam railroad, street railway, traction railway, autobus, canal, express, subway, pipe line, gas, electric light, heat, power, water, oil, sewer, telephone or telegraph system plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.

"Nothing contained in this Title shall extend the powers of the board to include any supervision and regulation of, or jurisdiction and control over any vehicles engaged in the transportation of passengers for hire in the manner and form commonly called taxicab service unless such service becomes or is held out to be regular service between stated termini; hotel busses used exclusively for the transportation of hotel patrons to or from local railroad or other common carrier stations, including local airports, or bus employed solely for transporting school children and teachers, or any autobus with a carrying capacity of not more than ten passengers now or hereafter operated under municipal consent upon a route established wholly within the limits of a single municipality,

which route does not in whole or in part parallel upon the same street the line of any street railway or traction railway or any other autobus route."

Title 48, Section 12-99 [48 N. J. S. A. § 12-99] of the Revised Statutes of New Jersey provides:

"Every railroad company shall start and run trains for the transportation of persons and property at regular times to be fixed by public notice.

"Every railroad company shall furnish sufficient accommodations for the transporation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting, the junctions of other railroads and at usual stopping places established for receiving way passengers and freight for that train.

"The company shall take, transport and discharge such passengers and property at and from and to such places, on the due payment of the legal fare or freight and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises."

APPENDIX "E"

PERTINENT SECTION OF THE FEDERAL BANKRUPTCY ACT

Subdivision (c)(2) of Section 77 [11 U. S. C. § 205(c)(2)] of the Bankruptcy Act provides:

"The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the

bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the appointment of such legal counsel for the trustees as they shall select, with power of removal. The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended the power to operate the business of the debtor. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 308

THE NEW JERSEY AND NEW YORK RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

I. Statement Opposing Jurisdiction

In compliance with Rule 12 of the Rule of the Supreme Court of the United States, as amended, Appellee, Board of Public Utility Commissioners, Department of Public Utilities, State of New Jersey presents this, its statement against the jurisdiction of this court to entertain a review upon appeal of the judgment under question.

A. Is there Statutory Grounds for Appeal?

The Appellant relies upon 28 U. S. C. A. 1257 (2) for the grounds for appeal. There was no decision by

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the highest court of the State in favor of the validity of any statute.

The decision of the highest court of the State found it unnecesary to determine the constitutionality of any statute or of the order under review by it since the Appellant "* * * has failed to prove a loss in its entire business or in its operation of train 613." (Appellant's Appendix A, page 23).

In substance what the court determined was that because of lack of proof in particulars pointed out by the court the constitutional validity of the Board's Order was not in issue and need not be determined.

In these respects the instant case differs from *King* vs. *City Council of Augusta* 277 U. S. 100, 48 Sup. Ct. 489 (1928) and cases following that decision.

For these reasons this court should decline to take jurisdiction in this cause.

B. Is There a Federal Question?

A consideration of all the record, the decision of the Supreme Court of New Jersey in 12 N. J. 281 (1953) and the decision of the Appellate Division, Superior Court of New Jersey in 23 N. J. Super. 43 (A. D. 1953) will show that this was a proceeding under R. S. 48:3-3 N. J. S. A. "No public utility shall provide or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service which reasonably can be demanded or furnished when ordered by the board".

The Board ordered the Railroad to continue the operation of Train No. 613, after notice and hearing. This order was based on public convenience and necessity or as set out in R. S. 48:3-3 N. J. S. A. a reasonable demand for the service. The Board held "that mere failure to earn a proper return on a line which is part of a system is not sufficient ground for discontinuance of a service". (Appellant's Appendix C, page 41.)

The order of the Board was upheld by the Supreme Court of New Jersey, 12 N. J. 281 (1953), (Appellant's Appendix A) and by the Appellate Division, Superior

Court of New Jersey, 11 N. J. 43 (AD 1953), (Appellant's Appendix B).

In indicating that the Appellant did not sustain the burden of proof the Supreme Court of New Jersey said, "* * * the railroad has failed to prove a loss in its entire business or in its operation of train 613." (Appellant's Appendix A, page 23.) "In a situation such as this where the public utility is an 80%-owned subsidiary of the parent company it is incumbent upon the subsidiary to prove the reasonableness of its expenditures and the accuracy of its accounts. This is especially true where there is extensive intermingling of employees and where the subsidiary is to a large extent dependent upon the parent for rental of its equipment. Inasmuch as the railroad's operating loss, both as to its entire system and as to the particular train in question, is a factor to be considered by the board, the railroad has the duty to present proof of the propriety of its expenditures and to establish that its operating deficiency is *bona fide.*" (Appellant's Appendix A, page 23, 24.)

Therefore, no substantial federal question is in issue.

II. Motion to Dismiss or Affirm

Comes, now, the Board of Public Utility Commissioners, Department of Public Utilities, State of New Jersey, the Appellee herein, by Frank H. Sommer, its Counsel, and moves this court to dismiss with costs the appeal herein to this court by the New Jersey and New York Railroad Company (Peter Duryee, Trustee) upon the following grounds:

A. The assignment of error filed herein does not draw in question the validity of any express state statute of the State of New Jersey on the ground of its being repugnant to the constitution, treaties or laws of the United States, and no decision herein of the

Supreme Court of New Jersey passed on that question. Therefore an appeal under 28 U. S. C. A. 1257 (2) should not be allowed.

B. Furthermore, neither the Board, or courts of New Jersey passed on any construction of Section 77, Bankruptcy Act, 11 U. S. C. A. 205 (c). They only found that from the evidence that the Railroad was a subsidiary or part of the system of the Erie Railroad and that additional evidence as to the reasonableness of the costs of the Railroad should have been produced. Therefore, a writ of certiorari under 28 U. S. C. A. 1257 (3) should not be allowed.

In the alternative, Appellee moves this court to affirm the judgment from which in the above-entitled causes purports to have been taken, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

THEODORE D. PARSONS,
Attorney General of New Jersey;
By: FRANK H. SOMMER,
Counsel for Appellee.

JOHN R. SAILER,
Deputy Attorney General,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 308

THE NEW JERSEY AND NEW YORK RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT OF THE BROTHERHOOD OF RAILROAD TRAINMEN OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

SAM A. COLARUSSO,
Counsel for Appellee:
The Brotherhood
of Railroad Trainmen.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 308

THE NEW JERSEY AND NEW YORK RAILROAD COMPANY,

Appellant,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, ET AL.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

I. Statement Opposing Jurisdiction

In compliance with Rule 12 of the Rule of the Supreme Court of the United States, as amended appellee, The Brotherhood of Railroad Trainmen presents this, its statement against the jurisdiction of this court to entertain a review upon appeal of the judgment under question.

A. Is There Statutory Grounds for Appeal?

The appellant relies upon 28 USCA 1257 (2) for the grounds for appeal. It states that an Order of the Board of Public Utility Commissioners is a "statute of any State".

It is requested that this court review its interpretation of this statute subsequent to the amendment of February 13, 1925, C. 229, § 1, 43 Stat. 937 in which the Congress eliminated the words "or an authority exercised under any state" in accordance with the dissent of Mr. Justice Brandeis in *King* v. *City Council of Augusta*, 277 US 100, 115; 48 Sup. Ct. 489, 494 (1928), which dissent was cited with approval by Mr. Justice Frankfurter in *Jamison* v. *State of Texas*, 318 U. S. 413, 417; Sup. Ct. 669, 672 as the case cited by Appellant in this matter for jurisdiction reviewing an order to a railroad were decided prior to 1925.

There was no express statute of New Jersey challenged during any phase of the proceedings as being repugnant to the constitution, treaties, or laws of the United States.

For these reasons this court should decline to take jurisdiction in this cause.

B. Is There a Federal Question?

A consideration of all the record, the decision of the Supreme Court of New Jersey in 12 N. J. 281 (1953) and the decision of the Appellate Division, Superior Court of New Jersey in 23 N. J. Super 1 (A. D. 1953) will show that this was a proceeding under R. S. 48:3-3 NJSA "No public utility shall provide or maintain any service that is unsafe, improper or inadequate, or withhold or refuse any service which reasonably can be demanded or furnished when ordered by the board."

The Board ordered the Railroad to continue the operation of Train 613, after notice and hearing. This order was based on public convenience and necessity or as set out in R. S. 48:3-3 NJSA a reasonable demand for service. Even though the evidence showed a deficit in passenger and overall operation the Board concluded "that mere failure to earn a proper return on a line which is part of a system

is not sufficient ground for discontinuance of a service." (Appellants Appendix C, page 41.)

The ratio decidendi of the Board was upheld by the Supreme Court of New Jersey, 12 NJ 281 (1953) (Appellants Appendix A) and by the Appellate Division, Superior Court of New Jersey, 23 N. J. Super. 1, (AD 1953) (Appellants Appendix B).

In addition, the Supreme Court of New Jersey said, "• • • the railroad has failed to prove a loss in its entire business or in its operation of train 613." (Appellants Appendix A page 23.) "In a situation such as this where the public utility is an 80%-owned subsidiary of the parent company it is encumbent upon the subsidiary to prove the reasonableness of its expenditures and the accuracy of its accounts. This is especially true where there is extensive intermingling of employees and where the subsidiary is to a large extent dependent upon the parent for rental of its equipment. Inasmuch as the railroad's operating loss, both as to its entire system and as to the particular train in question, is a factor to be considered by the board, the railroad has the duty to present proof of the propriety of its expenditures and to establish that its operating deficiency is *bona fide.*" (Appellants Appendix A, pages 23, 24.)

Therefore, no substantial federal question arose.

II. Motion to Dismiss or Affirm

Comes, now, the Brotherhood of Railroad Trainmen, the appellee herein, by Sam A. Colarusso, its counsel, and moves this court to dismiss with costs the appeal herein to this court by the New Jersey and New York Railroad Company (Peter Duryee, Trustee) upon the following grounds:

A. The assignment of error filed herein does not draw in question the validity of any express state statute of the State of New Jersey on the ground of its being repugnant

to the constitution, treaties or laws of the United States, and no decision herein of the Supreme Court of New Jersey passed on that question. Therefore an appeal under 28 USCA 1257 (2) should not be allowed.

Furthermore, neither the Board, or courts of New Jersey passed on any construction of Section 77, Bankruptcy Act, 11 USCA 205(c). They only found that from the evidence that the Railroad was a subsidiary or part of the system of the Erie Railroad. Therefore, additional evidence as to the reasonableness of the costs of the Railroad should have been produced. Therefore a writ of certiorari under 28 USCA (3) should not be allowed.

B. In the alternative, appellee moves this court to affirm the judgment from which in the above entitled causes purports to have been taken, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

SAM A. COLARUSSO,
Counsel for Appellee:
The Brotherhood
of Railroad Trainmen.

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No. 308. NEW JERSEY & NEW YORK RAILROAD CO. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY ET AL. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Richard Swan Buell* and *Justin W. Seymour* for appellant. *Theodore D. Parsons*, Attorney General of New Jersey, *John R. Sailer*, Deputy Attorney

General, and *Frank H. Sommer* for the Board of Public Utility Commissioners; and *Sam A. Colarusso* for the Brotherhood of Railroad Trainmen, appellees. Reported below: 12 N. J. 281, 96 A. 2d 526.